Nos. 12,716 and 12,813

United States Court of Appeals

For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION,
Appellant,

vs.

WILLIAM J. COGAN,
Appellee.

WILLIAM J. COGAN,
Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, STANDARD GAS AND ELECTRIC COMPANY and STANDARD POWER AND LIGHT CORPORATION,
Appellees.

(CONSOLIDATED CASES)

CHARLES T. JONES,
Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET RAILWAY COMPANY, STANDARD GAS AND ELECTRIC COMPANY and STANDARD POWER AND LIGHT CORPORATION,
Appellees.

PETITION FOR A REHEARING.

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PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

STATEMENT OF GROUNDS FOR PETITION FOR REHEARING.

1. There is no rational basis in fact for drawing the inference that Cogan, in effecting a settlement, was subject to a conflict of interest.

2. For a breach of trust falling short of a conflict of interest, it is an error of law to deny a fiduciary a fee without proof of damage.

3. The findings of the Securities and Exchange Commission approved by the opinion of this Court in effect confiscate a legitimate cause of action of the stockholder, Charles T. Jones, against Standard Power without affording him his day in Court.

ARGUMENT.

(1) This Honorable Court has, as did the Securities and Exchange Commission, seized upon casual remarks of petitioner Cogan passed in the reciprocal banter of a convivial luncheon (T.R. pp. 451-2) and so considered by his auditors (T.R. pp. 487-8) to deny Cogan his fee. On that basis and with the interdicted conversation treated in its proper setting, we state, with all deference to the Court, that the Court's opinion reduces the province of a fiduciary to that of a robot devoid of ordinary natural instincts for casual levity. No case in the books has gone so far.

It is conceded that Cogan was instrumental in uncovering the wrongful overcharges against Market Street by its parent companies (Opinion p. 5) and of developing the case against them (Opening Brief SEC pp. 43-44). After saving Market Street more than $600,000 (Opening Brief of SEC p. 35), his plea for recompense is summarily rejected, but his negotiated settlement, fee deleted, is found by the Securities and Exchange Commission and this Court to meet the standards of "fairness and equity" within the meaning of the Public Utilities Holding Company Act, and the settlement is by the Securities and Exchange Commission vigorously defended and demonstrated with mathematical exactness to be well within the range of the cash advanced to Market Street by its parent companies, plus interest (Opening Brief SEC pp. 38-43).

The Securities and Exchange Commission said, in its opinion denying Cogan his fee (P.R. pp. 61-62), and this Court adopted its statement (Opinion p. 5), that the "Commission declined to speculate upon the precise effect of Cogan's offer to accept a retainer from his adversary." Is it not within the realm of the arbitrary to attempt to demonstrate the fairness of a settlement negotiated by counsel and at the same time and in the same breath charge counsel with the taint of representing conflicting interests? Hasn't speculation in that regard perforce left the case? Does not the same proof which demonstrates the fairness of the settlement demonstrate the good faith, judgment and integrity of the negotiator?

(2) This Court has found in its opinion (p. 6) that "the Commission's inference that there was a conflict of interest was a reasonable one." That conclusion results from treating the interdicted conversation in a serious vein. So treated, there is still no evidence of a conflict of interest. If a retainer in other cases was solicited of Standard Gas, it was refused by it (T.R. pp. 487-8). The inchoate conflict died aborning. He never in fact served two masters.

The leading case on the subject, namely, *Woods v. City Bank and Trust Co.,* 312 U.S. 262, 268, lays down the governing rule as follows:

> "Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation."

That case was cited and followed in the case of *In re Midland United Co.,* 159 Fed. (2d) 340, where the Court at great length undertook to find and demonstrate the "actual" conflict of interest. At page 346 of the opinion, the Court said:

> "However, independent of Section 249, we hold that appellant is barred from recovery under the principles enunciated in the Woods and Avon Park cases. They hold, as already pointed out, that the bankruptcy court had plenary power to deny compensation to a fiduciary in a reorganization proceeding 'where an actual conflict of interest exists' regardless of whether 'fraud or unfairness' resulted.
>
> "The appellant does not dispute the fact that he was a fiduciary for Utilities' debenture holders

> and that as such he owed them a duty of loyalty. It is necessary, then, only to ascertain from the record as to whether or not there was an actual conflict of interest."

In the absence of a proven "actual" conflict of interest, which under the foregoing rules justifies, without more, a denial of a fiduciary's fee, the burden, on elementary principles, is on the Securities and Exchange Commission or the minority stockholders of Market Street (the clients of Cogan) to prove at least an indiscretion plus damage before Cogan's fee can be denied or even reduced. *Berner v. Equitable Office Building Corp.,* 175 Fed. (2d) 218. In that case, an attorney for the debtor in corporate reorganization tipped off one Bell that the corporation was placing "a new issue which would increase the value of the stock." The Court found, at page 221, the following:

> "* * * what Berner told Bell on the evening of July 8th amounted to giving him an opportunity to buy the shares at an unlawful advantage over the shareholders from whom he bought, and that this was a breach of trust."

The ruling of the Court at page 222 is as follows:

> "Nevertheless, since Congress limited the penalty of entire forfeiture to purchases by a fiduciary, we should not be warranted in extending that penalty to the situation at bar; and we think that the consequences should be only those which attend any breach of trust in equity: i.e., that in determining what the trustee's compensation shall be, the court will, as a matter of discretion dimin-

> ish the allowance which it would otherwise make, in proportion to the gravity of the breach * * * As neither the allowance itself, nor any reduction because of the breach, is for us, we shall not indicate what either should be, except merely to suggest, though not to require, that in any event the reduction may well be not less than the loss to the sellers of whom Bell bought the 20,000 shares."

In cases involving breaches of trust, like that in the *Berner* case, supra, the damage, if any, lends itself readily to proof, while in cases involving an actual conflict of interest such as that in the *Woods* case, supra, the proof of damage is elusive, if not impossible. The Court in the *Woods* case was cognizant of this distinction and gave voice to it in the following language at page 268:

> "Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation."

In the instant case, we have at worst an indiscretion on the part of a fiduciary who is and should be en-

titled to at least the consideration given to the attorney in the *Berner* case, supra. We reiterate that the settlement negotiated by him was proven to be both "fair and equitable" and therefore that the indiscretion did not result in a loss to his clients. Cogan therefore should be awarded his fee.

(3) The original plan of dissolution of Market Street called for settlement solely of the open account between Standard Gas and Electric Company and Market Street. This was in accordance with the settlement theretofore effected between Market Street and Standard Gas (T.R. p. 611). It was not until the Securities and Exchange Commission (P.R. pp. 93-94) itself solicited an amended plan of dissolution from Market Street, that any issue of a release of Standard Power ever came before the Commission. At that time Appellant Charles T. Jones, as a stockholder of Market Street, had his suit on file in the Federal Court in New Jersey against Standard Power. The subsequent action of the Commission in finding that the sum of $512,500 was a "fair and equitable" settlement of the open accounts of "Standard Gas and its subsidiaries including Standard Power" in effect confiscated that cause of action. This was done without any hearing before the Securities and Exchange Commission (Opening Brief SEC p. 45) as to the merits of Stockholder Jones' claim against Standard Power. It is most unusual, to say the least, that the attorney for Standard Gas in argument before the Commission stated that the original settlement between Market Street and Standard Gas contemplated

a release of Standard Power, when the settlement itself spoke only of Standard Gas (T.R. p. 611). The mere fact that the entire overcharges were the subject of evidence submitted by William J. Cogan to the Securities and Exchange Commission (Opinion, p. 4) did not justify the Commission in similarly injecting the "release of Standard Power" into the settlement heretofore arrived at with Standard Gas alone without a full hearing on the merits of Market Street's claim against Standard Power. Stockholder Jones has never had his day in Court.

It is respectfully submitted that a rehearing should be granted by this Honorable Court to both Charles T. Jones, and William J. Cogan, petitioners herein.

Dated, San Francisco, California,
January 25, 1952.

WILLIAM J. COGAN,
M. MITCHELL BOURQUIN,
Attorneys for Petitioners William J. Cogan and Charles T. Jones.

CERTIFICATE OF COUNSEL.

We hereby certify that we are of counsel for petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 25, 1952.

WILLIAM J. COGAN,
M. MITCHELL BOURQUIN,
Counsel for Petitioners.